90-498
No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF SOUTH CAROLINA,

Petitioner,

vs

HORACE BUTLER,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF SOUTH CAROLINA

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QUESTIONS PRESENTED FOR REVIEW

I. IS THE FIFTH AMENDMENT RIGHT NOT TO BE COMPELLED TO BE A WITNESS AGAINST HIMSELF VIOLATED WHEN A DEFENDANT DOES NOT TESTIFY AFTER THE TRIAL JUDGE ADVISES HIM THAT THERE IS A RISK THE JURY MAY WONDER WHY HE DID NOT TESTIFY?

II. WHETHER THE STATE COURT'S APPLICATION OF A PRESUMPTION OF PREJUDICE STANDARD IS APPROPRIATE FOR A VIOLATION OF A FIFTH AMENDMENT RIGHT NOT TO TESTIFY WHEN THE DEFENDANT DOES NOT TESTIFY AFTER THE ALLEGED COERCIVE JUDICIAL COMMENTS TO HIM?

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The Attorney General of South Carolina on behalf of the State of South Carolina petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina which granted the writ of habeas corpus and remanded the matter to the Charleston County Court of General Sessions for a new trial.

OPINION BELOW

The opinion of the Supreme Court of South Carolina granting the petition for a writ of habeas corpus in its original jurisdiction was filed on June 20, 1990. The opinion is unreported at the time of this filing of a petition for certiorari. It is appended hereto as Appendix A at pages 35-40.

JURISDICTION

The petition for certiorari is for review of the opinion of the Supreme Court of South Carolina which granted a petition for writ of habeas corpus in its original jurisdiction from a criminal conviction for murder which occurred on January 24, 1981. This Court has jurisdiction to review the lower court opinion in certiorari proceedings pursuant to 28 U.S.C. Section 1257(3) and Rules of the Supreme Court of the United States, Rule 10.1(b), (c).

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

(Emphasis added).

2. The Sixth Amendment to the United States Constitution which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

> accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

This petition for certiorari comes before this Court involving habeas corpus proceedings in the original jurisdiction of the Supreme Court of South Carolina occurring after this Court had denied a previous federal habeas corpus request on the part of Horace Butler in Butler v. McKellar, et al., ___U.S.___, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990).

1. Prior Procedural History.

On or about July 17, 1980, Pamela Lane, a seventeen-year old convenience store clerk, was murdered in Charleston County, South Carolina. On September 1, 1980, Horace Butler made a statement admitting his involvement in her murder to the Charleston County Police Department.

After an indictment for murder, the matter was tried before a jury and the Honorable C. Anthony Harris. A verdict of guilty was returned on January 24, 1981. On January 26, 1981, the trial jury further recommended imposition of the death penalty after finding beyond a reasonable doubt the existence of the statutory aggravating circumstance of murder was committed while in the commission of the crime of rape.

Butler filed an appeal to the Supreme Court of South Carolina which affirmed the conviction and sentence on February 22, 1982. State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1982). Certiorari was denied by this Court on October 12, 1982. Butler v. South Carolina, 459 U.S. 932 (1982).

Butler then made an application for state post conviction relief. Among the allegations raised one concerned his desire to testify in front of the jury in

desire to testify in front of the jury in the guilt phase of the trial. After hearing the testimony of the defense attorney and Butler, the Honorable Richard E. Fields, Presiding Judge, made the following findings of fact and conclusions of law:

> The Applicant also alleges that he desired to testify in the guilt stage in front of the jury about the circumstances of his statement. During the trial, the trial court made inquiry of the Applicant about his decision not to testify. (Tr. pp. 871-877). During the inquiry, the Applicant testified that he agreed with his lawyer's strategy not to have him testify, understanding the advantages and disadvantages. (Tr. pp. 871-872, 874-875). His statements in open court carry a presumption of verity which the applicant has wholly failed to rebut in this proceeding. Blackledge v. Allison, 431 U.S. 63 (1977). This Court finds that counsel made an informed decision not to call the Applicant in the guilt phase to testify. Counsel's tactical decision was based upon the Applicant's version of the facts, the effect of the reply testimony of Margo Brown, his ex-girlfriend, could give and

> Court, in hindsight, cannot find counsel performed outside of the standard of competence in not urging the Applicant to testify. His allegation must be denied.

Butler v. State, Court of Common Pleas (Honorable Richard E. Fields), January 28, 1984. (Butler v. McKellar., 88-6677, Joint Appendix, p. 84). An appeal was taken from the denial of state post conviction relief on this claim and other issues. After the denial of state court certiorari on some issues, the Supreme Court of South Carolina denied the appeal on August 27, 1985. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Certiorari was denied by this Court on January 26, 1986. Butler v. State, 474 U.S. 1093 (1986).

On May 2, 1986, Butler made a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina. On June 9, 1987, the Honorable G. Ross Anderson, Jr.,

United States District Judge, denied the Petition. Butler v. Aiken, C.A. No. 86-1093-3 (D.S.C. 1987). Upon appeal, the United States Court of Appeals for the Fourth Circuit affirmed the denial of habeas corpus relief on May 6, 1988. Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988). On December 2, 1988, the Court of Appeals entered its order denying the petition for rehearing and petition for rehearing en banc, Butler v. Aiken, 864 F.2d 24 (4th Cir. 1988). Certiorari was sought and granted on an unrelated issue. On March 5, 1990, the Supreme Court of the United States entered its opinion affirming the judgment of the Court of Appeals denying the petition for habeas corpus. Butler v. McKellar, ___U.S.___, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990). Rehearing was denied on April 23, 1990.

2. Present Proceedings.

After the denial of the petition for rehearing in this Court, Butler filed a petition for writ of habeas corpus in the original jurisdiction of the Supreme Court of South Carolina, styled Horace Butler v. Parker Evatt, Commissioner of the South Carolina Department of Corrections, and T. Travis Medlock, Attorney General of South Carolina. In the pleading, Butler contended that the trial judge's comments to Butler (out of the jury's presence) on how a jury may or may not view a defendant's decision not to testify was a violation of his Fifth Amendment rights, relying upon the decisions of the Supreme Court of South Carolina in State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707, 710 (1986); and State v. Cooper, 291 S.C. 332, 353 S.E.2d 441, 443 (1986). The State of South Carolina made its Return to the

Petition on May 29, 1990, contending, among other things, that the comments by the trial judge did not violate his Fifth Amendment rights to protect against compelled self-incrimination because Butler did not testify and the trial judge's comments did not deprive him of a fundamentally fair trial.

On June 20, 1990, the Supreme Court of South Carolina entered its order granting the petition for writ of habeas corpus. (Appendix A, pp. 35-40). The court stated "although we do not condone the delay in calling this grave constitutional error to our attention, under the unique and compelling circumstances of this case we grant petitioner relief."

3. Pertinent Facts to these Proceedings.

The issue before this Court concerns the 1981 trial judge's inquiry of Horace Butler concerning his decision not to

testify before the jury in the guilt phase of his capital murder trial. The record reveals that after the prosecution had rested its case, the defense presented three defense witnesses and then the defense counsel expressed his desire to conclude its case. Outside of the jury's presence, the trial judge inquired of the defendant, Horace Butler, as to whether he understood his counsel's statement that he did not intend to testify and whether he agreed with that strategy. (Tr. p. 871, l. 21 - p. 872, l. 2). The court further inquired of whether he understood his right to not testify and his right to testify. (Tr. p. 871, l. 3 - p. 877, l. 2). This colloquy is set forth in full at Appendix B, pp. 41-50). Particularly, the trial judge made the following inquiry:

> Court: And you have discussed in great detail, I assume, with your lawyer the possible advantages of not testifying, along with the disadvantages of not

testifying, is that correct? In other words, you have talked about the risk that you might be running by not getting on that witness stand, talked to your lawyer about that, haven't you?

Mr. Hill: He doesn't understand, Your Honor.

Court: All right. Let me tell you this. Even though I am going to tell the jury that they are not to consider in any way the fact that you don't testify, I am going to instruct them not even to mention it, not even to say to each other "wonder why he didn't testify." I tell you that jurors are only human beings and that there is a strong risk that you will be prejudicing your case by not testifying. Are you aware of that?

A. Yes, sir.

Court: You are? And you are willing to take that risk by not testifying? Don't misunderstand me, son. I don't mean to be threatening you in any way. I am trying to get some information which is my job to elicit. What I want to do is be sure that you are satisfied with not testifying.

Court Reporter: I didn't get his answer.

Court: I understood him to say yes, sir. I want you to tell

> me, son, have you talked to your lawyer about the fact that no matter what you say to the jury about what the law is, I cannot erase from their minds the natural tendency of any human being to wonder or wonder why the defendant didn't testify. What I am telling you is that you run some risk by not testifying. Are you aware of that risk?
>
> Mr. Butler: Yes, sir.

(Tr. p. 871, l. 15 - p. 873, l. 19). (App. pp. 41-44). The trial court continued to make inquiry of Butler after a recess where Butler consulted with his attorney. In the extended inquiry in which he tried to explain the risk he may take by not testifying, Horace Butler consistently maintained that he did not want to testify. (Tr. pp. 875-877). After the inquiry was over, the defense rested without Mr. Butler testifying. The trial judge, during his jury instruction, then stated the following:

> Mr. Foreman, ladies, and gentlemen, the constitution of our state provides that any person

> who is brought to trial on charges in this court may avail himself of his constitutional right to trial by jury and elect not to testify in that case himself. I tell you that any person who elects to exercise that constitutional right not to testify is entitled to not have that fact considered by the jury which listens and makes the decision as to his guilt or (innocence). I am instructing you that you would not in any way consider in your deliberations the fact that this defendant has not testified. You will not even mention it when you go back to your jury room. Put it from your mind and it makes no difference anyhow because, as I have charged you, the state has the responsibility of proving the material elements of the crime of murder.

(Tr. p. 945, l. 16 - p. 946, l. 4). The jury subsequently convicted Butler of murder. A sentencing proceeding was held in which Butler continued to not testify. During the argument, however, Butler chose to make an unsworn argument pursuant to South Carolina law to the jury as to why the death penalty was not appropriate.

(Tr. p. 1015). Sections 16-3-20(B), 16-3-28, CODE OF LAWS OF SOUTH CAROLINA (1976).

HOW THE FEDERAL QUESTION WAS RAISED BELOW

In his recent habeas corpus proceedings, Butler sought to challenge his conviction for the first time because the trial judge's comments violated his Fifth Amendment rights as determined by the State Supreme Court's prior decisions in Gunter, supra; Pierce, supra; and Cooper, supra. Further, he asserted that those cases created an irrebuttable presumption of prejudice in violation of a criminal defendant's Fifth Amendment right not to be compelled in a criminal case to be a witness against himself when a trial judge comments to a criminal defendant how a jury may or may not view a defendant's decision not to testify, citing Pierce, 346 S.E.2d at 710. In Pierce, the Supreme Court of South Carolina stated:

> Although Pierce did not testify, he had the right to make that decision free of any influence or coercion from the trial judge. It is virtually impossible to determine the actual effect the judge's improper statements had on Pierce; but we do not agree with the state's position that, because Pierce did not testify, the judge's comments are harmless error.

Pierce, 346 S.E.2d at 710. He further relied upon State v. Gunter, supra, in which the Supreme Court of South Carolina held "it is a violation of a defendant's Fifth Amendment rights for a judge to make comments on how a jury may or may not view a defendant's decision not to testify." Pierce, 346 S.E.2d at 710, citing Gunter.

In granting the petition for the writ, the Supreme Court of South Carolina concluded that the habeas request "is based on the fact that at his trial, the same trial judge [as in Gunter, Pierce, and Cooper] committed this identical error. If anything, the error here was

more egregious since it was subsequently determined that petitioner is mentally retarded ...." The Supreme Court of South Carolina, finding that "petitioner seeks to take advantage of constitutional principles recognized after his trial, appeal, and exhaustion of state post conviction relief proceedings," granted habeas relief on this "grave constitutional error under the unique and compelling circumstances of this case." (Appendix A, pp. 38-39).

REASONS WHY THE WRIT SHOULD BE GRANTED

The Fifth Amendment to the United States Constituiton provides in part that: "No person ... shall be compelled in any criminal case to be a witness against himself ...." In United States v. Washington, 431 U.S. 181, 187 (1977), this Court recognized that "absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated ...."

In conflict with the decisions of this Court, other state courts and federal courts of appeal, the Supreme Court of South Carolina has erroneously interpreted the Fifth Amendment to preclude judicial comment to a criminal defendant of a risk that a jury may wonder why a defendant did not testify when determining whether he understood his right to testify or not testify. The lower court has further struck new ground by placing this alleged "grave constitutional error" with a presumption of prejudice where an appropriate standard under this Court's precedent for similar constitutional violations should be subject to a harmless error analysis. The lower court's decision shakes the foundation of both the Fifth and Sixth Amendments because it fails to recognize that "whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."

Brooks v. Tennessee, 406 U.S. 605, 512 (1972). Certiorari should be granted to ensure that the focus of the Fifth Amendment right not to be compelled to be a witness against himself is on whether the defendant was officially compelled to be a witness. Further, this Court should establish that Fifth Amendment violations are subject to an appropriate harmless error analysis, particularly where such comment did not change a defendant's tactical decision.

1. The decision of the Supreme Court of South Carolina conflicts with the decisions of this Court and other state and federal courts.

In Carter v. Kentucky, 450 U.S. 288, 302, n. 18 (1981), the United States Supreme Court recognized that "it has been universally thought that juries notice a defendant's failure to testify" and that "the layman's natural first suggestion

would probably be that the resort to privilege is a clear confession of crime." Importantly, in Carter, the court stated the following principle:

> A trial judge has a powerful tool at his disposal to protect the constitutional privilege -- the jury instruction -- and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

Carter, 450 U.S. at 303.

Here, the state trial judge properly gave a "no influence" instruction required by Carter. The perceived Fifth Amendment problem solely derives by the trial judge's comment to the defendant that there was a risk the jury might wonder why he did not testify. The state court characterized this judicial comment of a

fact recognized by this Court in Carter to be a Fifth Amendment violation and a "grave constitutional error." Clearly, we submit that such comment was no constitutional error.

The problem with the state court decision is that it refuses to acknowledge the principle set forth in Carter that "no judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation." Id. When the state trial judge made the comment that there was a risk the jury may speculate about why he did not testify, it is clear the judge was stating the principle "universally recognized." In light of the Court opinion in Carter, would it have been appropriate for the trial judge to tell a criminal defendant when he is making his decision on whether to testify that without any doubt the jury will not speculate about why he failed to testify?

Clearly, that comment would be factually wrong according to Carter. Here, the trial judge essentially told t'e defendant that by giving the no inference instruction he would reduce the risk of speculation to a minimum. Such comment was in accord with Carter and the Fifth Amendment, particularly when a defendant, through counsel, states he did not understand the advantages and disadvantages of not testifying.

Similarly, other state and federal courts have rejected uniformly the approach adopted by the State Supreme Court. In a case remarkably similar to the situation at hand, the Court of Special Appeals of Maryland has held that a trial judge's explanation of a defendant's right to testify in which he acknowledged that the juror might infer from defendant's failure to testify that he was guilty, did not constitute reversible error. Wooten-Bey

v. State, 547 A.2d 1086, (Md. App. 1988) aff'd. 568 A.2d 16 (Md. 1990). In Wooten-Bey, the trial judge stated to the defendant:

> The Court ... let me see if I can address it to you in layman's terms. If you choose not to take the witness stand, part and parcel of what goes along with that is the possible disadvantage that someone on that jury panel is going to say, look, this guy is obviously guilty, because guilty people hide. And innocent people are willing to talk. That could happen and all the judges' instructions in America cannot overcome a person who is of contrary mind, if you know what I mean. I sit there and say you can't do this, and they say, the hell I can't. So if you don't testify, obviously one of the disadvantages that could go along with not testifying, it doesn't mean it will. If they listen to my instructions to a fare thee well and most jurors do. It is my experience that they follow judges' instructions right down the line. Then that adverse part would not play a part. I cannot tell you, you are saying to me, but what is this business about Harvey getting to cross-examine me? Well, if you do take the witness stand, Harvey, Mr. Harvey will have the right to cross-examine you. You may choose not to. Although honesty impels me to say, I can't conceive of that. Ibid. at 1093.

In Wooten-Bey, the defendant did take the stand (unlike the instant situation in Butler) and testify and the Court of Appeals found that the issue before them was "whether appellant was misled and induced by the trial judge's explanation into taking the stand, thus risking the juror's exposure to his prior criminal record." The court then found that the defendant, from statements contained in the trial record, had made the decision to testify "long before the trial judge made these allegedly erroneous comments" and that therefore, in light of the fact that the trial judge covered the basics, on defendant's right not to testify and his remarks, the trial judge did not err. The trial judge's comments were not found to be error in spite of the fact that the defendant there did testify, while in the instant case, Horace Butler did not testify just as he asserted he had chosen not

to testify prior to Judge Harris' allegedly offensive remarks. Just as the court in Wooten-Bey pointed out, if the remarks of the trial judge do not sway the defendant to a change of position, although his statements may be inappropriate, no reversible error has been committed.

In the case of United States v. Goodwin, 770 F.2d 631 at 637 (2nd Cir. 1985), the Court of Appeals found comments by a trial judge that may have coerced the defendant to testify allegedly in violation of the Fifth Amendment were a constitutional violation but that the violation was harmless beyond a reasonable doubt. In Goodwin, the defendant upon questioning by the trial judge as to whether she had decided not to testify responded "I don't know what would be best. Most of the things that have been brought out I just don't know. I feel that would probably be best." 770 F.2d at 636. The

defendant affirmed that she understood her rights both to testify and not to testify and asked to speak with her sons for a few minutes. The judge's comments therein included language as to whether the jury would be desirous of hearing her position of innocence, that he was surprised by her decision about testifying and his impression was that she was going to maintain her innocence and take the position that the government witnesses were lying. The defendant later decided to testify, against the advice of her attorney. The Court of Appeals found that while they were certain the defendant took the judge's comments into consideration in making her decision, her will was not overborne.

> Furthermore, even if the judge's comments did compel Goodwin to testify, in violation of the Fifth Amendment, we believe that the constitutional error was harmless beyond a reasonable doubt. Ibid at 637.

Again, as in Wooten-Bey, the effect of the judge's comments, whether or not they were actually coercive in nature, resulted in the defendant's decision to testify, whereas in the instant case, Horace Butler steadfastly held firm to his original decision, concurring in the advice of his attorney, not to testify concerning the facts and circumstances of his case in front of the jury.

In a related case, People v. Phillips, 542 N.E.2d 814 (Ill. App. 1989), the appellate court of Illinois held that a trial judge's requirement that the defendant had to testify immediately after the close of the state's case, if he were to testify at all, though erroneous was harmless error since the defendant had already made his decision not to testify prior to the trial as part of his defense strategy with his attorneys concurrence and therefore "there was no prejudice to

the defendant as a result of this error." 542 N.E.2d at 819. Although the facts of the case are different, the situation and result are the same as in this case where Butler had earlier made his decision not to testify as part of the defense strategy prior to the questioning by the judge and stuck to that decision.

2. The presumption of prejudice standard adopted by the State Supreme Court is not the appropriate standard for a Fifth Amendment violation when a defendant does not testify.

Here, the state court concluded that the mere statement by a trial judge to a defendant that the jury may speculate why he did not testify was reversible constitutional error even though such comments did not compel Butler to testify. In doing so, it rejected a request for harmless error analysis under Chapman v. California, 386 U.S. 18 (1967), by apply-

ing a presumption of prejudice standard it had earlier adopted in State v. Pierce, 289 S.C. 430, 346 S.E.2d 707, 710 (1986). This approach is in conflict with the decisions of this Court and other federal circuit courts.

In Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978), adhering to 549 F.2d 971 (5th Cir. 1977), the Fifth Circuit applied the Chapman harmless error standard to a question as to whether a defendant was deprived of a constitutional right to testify. More recently in U.S. v. Teague, 908 F.2d 752 (11th Cir. 1990), the Eleventh Circuit applied a Chapman harmless error analysis to whether Teague made a knowing, voluntary, and intelligent waiver of his right to testify. Similarly, in Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir. 1990), the court rejected a presumption of prejudice standard while also concluding the petitioner was not denied

his right to testify by trial counsel's advice. Similarly, such a standard was again rejected in U.S. v. Curtis, 742 F.2d 1070, 1075-76 (7th Cir. 1984), when that court held that when a defendant persisted in a desire to testify, but planned to offer perjured testimony, a defendant's right to testify was not violated when the attorney failed to allow him to take the witness stand. We have previously noted the application of the Chapman test to situations in Wooten-Bey, supra; U.S. v. Goodwin, supra, and People v. Phillips, supra. Also U.S. v. Arthur, 602 F.2d 660, 664 (4th Cir. 1979) (application of Chapman standard appropriate where interrogation of advice about right not to testify took place out of jury's presence and had no effect on the outcome of the trial).

The harmless error standard of Chapman, under which a reviewing court should not set aside an otherwise valid convic-

tion if the court may confidently say, on the whole record, that the constitutional error in question was harmless beyond a reasonable doubt, should apply to judicial comments about the effect a jury may give to a failure to testify which do not induce a defendant to testify. Here, it was the developed strategy that Butler would not testify which Butler has acknowledged both at trial and in state post conviction relief proceedings. Where the prejudicial comments do not "compel" a defendant to take the witness stand, clearly there has been no constitutional violation of his Fifth Amendment right mandating a new trial. Since Chapman, this Court has repeatedly applied that standard to a variety of constitutional errors of similar magnitude. E.g., Rose v. Clark, 478 U.S. 570 (1986) (erroneous malice instruction); Delaware v. Arsdall, 475 U.S. 673 (1986) (failure to permit

cross-examination concerning witness bias); Rushen v. Spain, 464 U.S. 114, 118 (1983) (per curiam) (denial of right to be present at trial); United States v. Hasting, 461 U.S. 499, 508-509 (1983) (improper comment on defendant's failure to testify); Moore v. Illinois, 434 U.S. 220, 232 (1977) (admission of witness identification obtained in violation of right to counsel); Milton v. Wainwright, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel); Chambers v. Maroney, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment). It is only when constitutional errors either aborted the trial process, as in Payne v. Arkansas, 356 U.S. 560 (1958) (use of a coerced confession), or denied it altogether, as in Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510 (1927)

(adjudication by a biased judge), that the Court has concluded such errors could never be harmless. While there are some errors to which the harmless error standard does not apply, this is the exception rather than the rule. Rose v. Clark, supra, 478 U.S. at 578. Here, certiorari is appropriate to resolve its applicability to judicial comments which neither compel testimony from a defendant nor misstate universal facts recognized by this Court.

The State of South Carolina submits that the granting of certiorari would ensure that the purpose of the Self-Incrimination Clause is maintained. That purpose, we submit, is to "determine whether the petitioner has been 'compelled ... to be a witness against himself.' Compulsion is the focus of the inquiry." Carter, supra, 450 U.S. 306 (Powell, J., concurring). As Justice Powell clearly

stated: "A defendant who chooses not to testify hardly can claim that he was compelled to testify." Id. at 306. The Supreme Court of South Carolina's determination to the contrary demands reconsideration upon certiorari by this Court.

CONCLUSION

For all reasons set forth within the petition, we respectfully request this Court to grant our petition for certiorari.

Respectfully submitted,

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September 18, 1990
Columbia, South Carolina

APPENDIX A

THE SUPREME COURT OF SOUTH CAROLINA

Horace Butler, Petitioner,

v.

The State of South Carolina, Respondent.

ORDER

Petitioner, a death row inmate, seeks a writ of habeas corpus. After careful consideration of the important issues raised by his petition, and in light of the unique circumstances involved in this matter, we grant the writ.

Petitioner's conviction and sentence were affirmed on direct appeal. State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1982), cert. denied, 459 U.S. 932 (1983). Three years later we affirmed the denial of petitioner's request for post conviction relief. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474

U.S. 1094 (1986). Petitioner has now exhausted his federal reviews.

Three and one-half years after petitioner's direct appeal was affirmed, and approximately one and a half months after the decision in Butler v. State, this Court issued its opinion in State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985). In Gunter we held the trial judge violated the defendant's fifth amendment rights by coercing him to take the witness stand in his defense. We deplored the judge's warning that even though he would charge the jury they could not consider the defendant's failure to testify, the jury would most likely ignore this instruction.

Subsequently, two capital cases raising this issue came before us. In State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986), and State v. Cooper, 291 S.C.

332, 353 S.E.2d 441 (1986), the same trial judge made similar comments to each defendant. Both defendants had chosen not to testify, and neither was swayed by the judge's comments. The State argued, therefore, that any error was harmless since the defendants were not prejudiced. We rejected the suggestion that these types of comments could ever constitute harmless error, noting, "The comments by the judge were erroneous, improper and contrary to South Carolina law." State v. Pierce, 289 S.C. at 434, 346 S.E.2d at 710.

Petitioner's request for habeas corpus is based on the fact that at his trial, this same trial judge committed this identical error. If anything, the error here was more egregious since it was subsequently determined that petitioner is

mentally retarded.[1] A review of the colloquy in light of this fact (unknown to the trial judge at the time) raises serious questions whether petitioner even understood the proceedings. Cf., State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988) (valid waiver not established by mentally retarded defendant's bare assent to leading questions).

"The great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention." Walker v. Wainwright, 390 U.S. 335, 88 S.Ct. 962, 19 L.Ed.2d 1215 (1968). Here, petitioner seeks to take advantage of constitutional principles recognized after his trial, appeal, and exhaustion of

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[1]Some evidence of petitioner's retardation was produced at the sentencing phase of his trial; the judge's comments were made during the guilt phase. The most recent testing indicates petitioner has a Full Scale I.Q. of 61, a Verbal I.Q. of 65, and a Performance I.Q. of 61.

state post conviction relief proceedings. We caution that not every intervening decision, nor every constitutional error at trial will justify issuance of the writ. Rather, the writ will issue only under circumstances where there has been a "violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." State v. Miller, 16 N.J.Super. 251, 84 A.2d 459 (1951) (emphasis added); see also Uveges v. Commonwealth of Pennsylvania, 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127 (1948). Although we do not condone the delay in calling this grave constitutional error to our attention, under the unique and compelling circumstances of this case we grant petitioner relief.

Accordingly, the writ of habeas corpus is granted. The matter is remanded

to the Charleston County Court of General Sessions for a new trial.

IT IS SO ORDERED.

s/ George T. Gregory, Jr., C.J.

s/ David W. Harwell, A.J.

s/ A. Lee Chandler, A.J.

s/ Ernest A. Finney, A.J.

s/ Jean H. Toal, A.J.

Columbia, South Carolina

June 20, 1990

APPENDIX B

THE COURT OF GENERAL SESSIONS

FOR CHARLESTON COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA

v.

HORACE BUTLER

EXCERPTS FROM TRIAL

[871]

(Jury retires to the jury room.)

COURT: Mr. Butler, I want you to stand up, please. Your lawyer tells me, as you just heard him say, he does not intend for you to testify in this case. You understand that?

MR. BUTLER: Yes, sir.

COURT: Do you agree with your lawyer's strategy in not [872] testifying?

MR. BUTLER: Yes, sir.

COURT: You know that the Constitution of the United States and of South Carolina both gives to anyone who is charged with a crime, any crime, the right to be tried by a jury which you have quite properly elected to do, avail yourself of, and to stand that trial without having to get on the witness stand and testify if that defendant doesn't want to do so. You understand that right?

MR. BUTLER: Yes, sir.

COURT: By the same token, you have every right to testify and to tell your side of it, to tell any circumstances which you think would help you. You understand that?

MR. BUTLER: Yes, sir.

COURT: And you have discussed in great detail, I assume, with your lawyer the possible advantages of not testifying, along with the disadvantages of not testi-

COURT: You know that the Constitution of the United States and of South Carolina both gives to anyone who is charged with a crime, any crime, the right to be tried by a jury which you have quite properly elected to do, avail yourself of, and to stand that trial without having to get on the witness stand and testify if that defendant doesn't want to do so. You understand that right?

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MR. BUTLER: Yes, sir.

COURT: And you have discussed in great detail, I assume, with your lawyer the possible advantages of not testifying, along with the disadvantages of not testi-

fying, is that correct? In other words, you have talked about the risk that you might be running by not getting on that witness stand, talked to your lawyer about that, haven't you?

MR. HILL: He doesn't understand, Your Honor.

COURT: All right. Let me tell you this. Even though I am going to tell the jury that they are not to consider in any way the fact that you don't testify, I am going to instruct them not even to mention it, not even to say to each other [873] "wonder why he didn't testify." I tell you that jurors are only human beings and that there is a strong risk that you will be prejudicing your case by not testifying. Are you aware of that?

A. Yes, sir.

COURT: You are? And you are willing to take that risk by not testifying? Don't

lying, is that correct? In other words, you have talked about the risk that you might be running by not getting on that witness stand, talked to your lawyer about that, haven't you?

MR. HILL: He doesn't understand, Your Honor.

COURT: All right. Let me tell you this. Even though I am going to tell the jury that they are not to consider in any way the fact that you don't testify, I am going to instruct them not even to mention it, not even to say to each other [sic] "Wonder why he didn't testify." I tell you that jurors are only human beings and that there is a strong risk that you will be prejudicing your case by not testifying. Are you aware of that?

A. Yes, sir.

COURT: You are? And you are willing to take that risk by not testifying? Don't

misunderstand me, son. I don't mean to be threatening you in any way. I am trying to get some information which is my job to elicit. What I want to do is be sure that you are satisfied with not testifying.

COURT REPORTER: I didn't get his answer.

COURT: I understood him to say yes, sir. I want you to tell me, son, have you talked to your lawyer about the fact that no matter what you say to the jury about what the law is, I cannot erase from their minds the natural tendency of any human being to wonder or wonder why the defendant didn't testify. What I am telling you is that you run some risk by not testifying. Are you aware of that risk?

MR. BUTLER: Yes, sir.

COURT: And you are willing to take that risk in order to avoid going on the wit-

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MR. BUTLER: Yes, sir.

COURT: And you are willing to take that risk in order to avoid going on the wit-

ness stand and being cross examined by the solicitor, is that right?

MR. BUTLER: I can't answer that.

COURT: Sir?

MR. HILL: He said he couldn't answer that.

[874] COURT: Well, you are going to have to answer that before we proceed with the trial. I want to know and be sure that he has been thoroughly apprised of what is about to transpire here and he personally agrees with that course of conduct. All right, let's start over again. During lunch time you and your lawyer talked about this case, didn't you, son?

MR. BUTLER: Yes, sir.

COURT: And he talked about you not testifying, did he? Tell me what you all talked about at lunch. Wasn't it about your case? Mr. Hill, I am going to ask you to take your client somewhere private-

been stand and being cross examined by the solicitor, is that right?

MR. BUTLER: I can't answer that.

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MR. BUTLER: Yes, sir.

COURT: And he talked about you not testifying, did he? Tell me what you all talked about at lunch. Wasn't it about your case? Mr. Hill, I am going to ask you to take your client somewhere private-

ly and talk to him so that he can properly answer my questions.

MR. HILL: All right.

COURT: I am sure you have already done so. I am not suggesting that you haven't. Advise him of what I am trying to do. I am not trying to get him to change his mind or do anything, but I am not going to waste three days of my time and yours and these jurors by having him say I don't know. I can't make up mind or not. He is going to have to tell me something before we proceed with the trial.

MR. HILL: He wants to go in the room with me, Your Honor.

COURT: Certainly. that is what I meant. But you understand what I mean, Mr. Hill.

MR. HILL: Yes, sir.

ly and talk to him so that he can properly answer my questions.

MR. HILL: All right.

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MR. HILL: He wants to go in the room with me, Your Honor.

COURT: Certainly. That is what I meant. But you understand what I mean, Mr. Hill.

MR. HILL: Yes, sir.

COURT: I want him to tell me that he has discussed it [875] with you and he agrees not to testify.

(Mr. Hill and Mr. Butler leave the courtroom.)

(Mr. Hill and Mr. Butler return to the courtroom.)

COURT: Mr. Butler, let me talk with you further, if you will. While ago you heard the lawyer say that is the defendant's case. You heard him say that. That means that you are not going to testify. You understand that?

MR. BUTLER: Yes, sir.

COURT: Means you are not going to come around here and sit down there and tell that jury your side of this controversy. You are not going to get a chance to say "I didn't do it; I wasn't around there" or say anything like that. Do you understand that? You have talked to your lawyer

COURT: I want him to tell me that he has discussed it [87?] with you and he agrees not to testify.

(Mr. Hill and Mr. Butler leave the courtroom.)

(Mr. Hill and Mr. Butler return to the courtroom.)

COURT: Mr. Butler, let me talk with you further, if you will. While ago you heard the lawyer say that is the defendant's case. You heard him say that. That means that you are not going to testify. You understand that?

MR. BUTLER: Yes, sir.

COURT: Means you are not going to come around here and sit down there and tell that jury your side of this controversy. You are not going to get a chance to say "I didn't do it; I wasn't around there" or say anything like that. Do you understand that? You have talked to your lawyer

about that procedure, didn't you, about you not testifying?

MR. BUTLER: Yes.

COURT: Before he told me that is the defendant's case, you all had already talked about that, right?

MR. BUTLER: Yes, sir.

COURT: Now, do you agree with your lawyer that you ought not to testify in this case?

MR. BUTLER: Yes, sir.

COURT: Do you know that, as I just finished telling you, there is a serious risk involved in that procedure because human beings are naturally going to wonder why he didn't testify. Are you aware of that?

[876]

MR. BUTLER: Yes, sir. I ain't guilty.

COURT: I am not arguing with you about that, son. It is just like, for instance,

if a couple of fellows stand around and one of them accuses the other one of doing something and that one never says a word, makes you wonder, doesn't it, wonder why he didn't deny that he did it. That fellow accused him of doing it and he wouldn't deny it. It would raise a question in your mind, wouldn't it?

MR. BUTLER: Say that over again.

COURT: Suppose you and I are out here, not in court, anywhere else, but I walk up to you and say, "Dad gum it, Horace, you stole my wallet," and you don't say a word. I say, "Dad gum it, I say you stole my wallet," and you don't say a word. A fellow standing over here and listening to us is going to think you stole my wallet, isn't he, because he will think if Horace didn't do it, he is going to say I didn't do it. See what I mean?

MR. BUTLER: Yes, sir.

COURT: All right. That risk is what you are taking with this jury, even though I tell them they can't do that. They might do it anyhow and I have got no way of controlling them, once they go in the jury room. Do you understand?

MR. BUTLER: Yes, sir.

COURT: And are you now being advised of that risk, satisfied with the position which your lawyer and you have agreed [877] on not to testify in this case?

MR. BUTLER: Yes, sir.

COURT: All right. Thank you. Be seated.